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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re H.W., a Person Coming Under the
Juvenile Court Law.

B208598
(Los Angeles County
Super. Ct. No. CK60398)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

E.H.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, S. Patricia Spear, Judge. Affirmed in part; reversed in part with directions.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., Los Angeles County Counsel, James M. Owens, Assistant County Counsel, O. Raquel Ramirez, Deputy County Counsel for Plaintiff and Respondent.

I. INTRODUCTION

E.H. is the biological father of H.W., his daughter. E.H. appeals from an order denying his Welfare and Institutions Code¹ section 388 petition to modify juvenile court orders to find him a presumed father and grant him reunification services. E.H. also unsuccessfully sought custody of the child, who was born in the summer of 2005. As an alternative argument, E.H. asserts that the juvenile court orders cannot stand because of noncompliance with the notice requirements of the Indian Child Welfare Act. (25 U.S.C. §§ 1901-1963.) We reverse and remand the matter solely to ensure compliance with the Indian Child Welfare Act.

II. BACKGROUND

The family came to the court's attention after the Los Angeles County Department of Children and Family Services (the department) filed a section 300 petition on behalf of the child, who was born with a positive toxicology screen for amphetamines. The mother, D.W., tested positive for amphetamines and methamphetamines. As sustained, the petition alleged the mother had a history of substance abuse and was a current amphetamines and methamphetamines user.

The detention report stated that the mother's whereabouts were unknown. The report did not mention the father. Rather, the juvenile court stated the mother had identified C.E. as the infant's father. C.E. had indicated he had only known the mother a little more than a year. Hospital staff stated that C.E. had disappeared after the mother

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All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

left the hospital. C.E. did not appear for a meeting with the department to assess and determine placement of the child. C.E. asked the mother if she was sure he was the father. C.E. pointed out the infant's skin color and hair texture. On August 31, 2005, the mother filled out a paternity questionnaire which identified C.E. as the child's father.

The mother, the maternal grandmother, and a maternal cousin, L.S. (the foster mother), attended the detention hearing. In response to an inquiry by the juvenile court about Native American heritage, the mother said, "[Y]es, your honor, but it is not registered." The juvenile court then ordered the department to make inquiries and provide notice pursuant to the Indian Child Welfare Act. The department was also ordered to assess the foster mother, who lives in San Diego, for placement of the child. The mother wanted the baby placed with the foster mother, L.S.

In a pre-release investigation report dated September 7, 2005, the department stated that, upon release from the hospital, the child was placed with the foster mother. The child was 10 days old at the time. According to the department, the foster mother was willing and able to provide the child with a safe, stable, and nurturing home. The mother was not present at the pre-release investigation hearing on September 7, 2005. The juvenile court ordered the child placed with the foster mother.

On September 23, 2005, the department reported that it had been unable to contact the mother about any Indian heritage because her whereabouts were unknown. The foster mother said the child's maternal great grandmother had some Indian heritage. However, the foster mother was unable to provide any details. The maternal grandmother did not respond to a message left by the department investigator.

On September 14, 2005, C.E., who eschewed in the proceedings, denied that he was the child's father. The mother told C.E. several days after the child's birth that he was not the father. C.E. added, "[S]he looks nothing like me." The foster mother said the mother called about the child on a regular basis. But according to the foster mother, the mother had not been to see the child. The foster mother intended to bring the child to Los Angeles on September 17, 2005. The mother would visit the child then. At the jurisdictional hearing, the juvenile court sustained the petition under section 300,

subdivision (b). The matter was continued to November 4, 2005, for the disposition hearing and for the department to give notice to the Bureau of Indian Affairs and the Secretary of the Interior.

Notices were sent to the Indian affairs bureau and the interior secretary on September 27, 2005. On November 4, 2005, the juvenile court continued the disposition hearing for 60 days to allow a response from the Indian affairs bureau or the interior secretary. On January 20, 2006, the department sent notices to the Indian affairs bureau and the interior secretary. The notices listed unknown tribal affiliations as follows: possible names for the child; the mother's name two former addresses and birth date; C.E.'s name and address; the maternal grandmother's name and address; and the maternal great grandmother's name. On April 3, 2006, after several more continuances, the juvenile court found there was compliance with the notice requirements of the Indian Child Welfare Act.

The juvenile court declared the child to be a dependent child. The child was removed from the mother's custody. The child was placed with the foster mother. The mother was given reunification services but C.E. was not. The mother was ordered to participate in: counseling; parenting classes; drug counseling; and random drug testing. The mother was also given monitored visits. The mother did virtually nothing to comply with the case plan. By December 2007, the mother had only visited the child four times. After the child was detained, the mother was arrested numerous times. She was arrested for drugs and prostitution and paroled on September 21, 2006. The mother was also: arrested on January 26, and released on February 6, 2007; arrested on March 14; arrested on May 6, 2007; arrested on June 11, 2007; and arrested on September 5, 2007

On October 2, 2006, the juvenile court extended reunification services for the mother and continued the case to April 2, 2007, for a 12-month review. The mother appeared at the April 2, 2007 hearing. The father accompanied the mother to the April 2, 2007 hearing. The mother's attorney stated, "Your honor, [the mother] indicates that [the father] may indeed be a possible biological father." The father refused the juvenile court's offer to appoint counsel for him. However, the father requested a paternity test.

The juvenile court ordered paternity testing. The juvenile court also ordered the mother and the father to appear on June 7, 2007, for a contested 12-month review hearing. The mother subsequently filled out a Paternity Questionnaire which identified him as a possible father.

Neither the mother nor the father appeared at the contested June 7, 2007 review hearing. The juvenile court terminated the mother's reunification services and continued the matter to August 9, 2007, for results of the paternity test. The juvenile court set the matter for a section 366.26 hearing on December 6, 2007, indicating that the child's permanent plan goal was adoption.

The department reported that a paternity test scheduled for June 8, 2007, had to be rescheduled because the father was late. The department had left messages about the test on June 5 and 6, 2008. The father submitted to a paternity test on June 15, 2007. The client authorization form from the paternity testing laboratory signed by the father states his ethnicity is Black, Native American (Cherokee), and Samoan. The father called the department for results on June 19, 2007. On June 25, 2007, the paternity test results showed he could not be excluded as the child's biological father. The probability of the father being the parent was 99.99 percent as compared to an untested and unrelated man. The laboratory reported that the father's ethnicity was Black, American Indian, and Samoan. Despite the laboratory report indicating American Indian ancestry, the department stated on August 9, 2007, the Indian Child Welfare Act did not apply.

In the August 9, 2007 report, the department stated that father had known about the child's existence since September 2006. However, the father had not: requested visitation; made any effort to have contact with the child; or provided for the child's support. At the August 9, 2007 hearing, the juvenile court notified the father that he was the biological father. But the juvenile court held the issue of presumed father status in abeyance until the next hearing. The father requested an attorney be appointed to provide representation. The father requested visitation. The juvenile court ordered monitored visitation.

On August 22, 2007, the department left a message for the father asking him to call to arrange an appointment to review instructions concerning monitored visits. When the father met with social worker, Hilda Rodriguez-Besada, he complained it was taking too long to visit with the child. He wanted to visit with her as soon as possible. The father had been trying to call the maternal grandmother because the foster mother brought the child to the Los Angeles area on Sundays. However, the maternal grandmother had not responded to the father's calls. The father stated he wanted custody of the child. The father did not want the child to remain with the foster mother. The father further stated that the mother had made some mistakes. But the father believed the child should be with the mother in the future. In the father's opinion, the mother should be given an opportunity to resolve her problems. The father said that he did not want the "system" to take his child and he was going to fight for her. The father had tried to help the mother when they stayed together and he was told he was the child's father. He tried to get the mother into a drug program and he would lock her in the house to prevent her from leaving to ingest narcotics. The department advised the father that the child was in San Diego so he must travel there for visits. The father was also told that the foster mother came to the Los Angeles area the third week of each month so the father could visit then.

The social worker, Ms. Rodriguez-Besada, visited the child in San Diego on August 30, 2007. The child was nicely dressed and playing with one of her foster brothers. The child was healthy. The foster mother reported that the child was very smart, knew how to dress without assistance, and was making "a lot" of progress in daycare. The foster mother celebrated the child's second birthday at a Chuck E. Cheese restaurant. Ms. Rodriguez-Besada saw pictures of the party. The foster mother was very committed to adopting the child. The child appeared to be very bonded to the foster mother. The child was likewise closely bonded to the foster mother's two sons. During a visit to the foster home on November 15, 2007, the social worker, Ms. Rodriguez-Besada, observed the child to be healthy and happy. The child spontaneously kissed and hugged the foster mother. The foster mother was very attentive to the child's needs. The child

was very affectionate to the foster mother. The child referred to the foster mother as, “[M]om.” The social worker observed the child at daycare where the youngster had learned to use sign language and speak Spanish.

A visit was scheduled for 1 p.m. on Sunday, September 2, 2007. However, the father was two hours late and did not call to tell the foster mother he would be late. The foster mother stayed an additional two hours so the father could visit with the child. The child was very shy around the father. The father brought the child an adult silver necklace. The foster mother indicated that the father had asked to see pictures of the child sometime in October 2006. The father visited on September 9, 2007. There was no visit on September 16, 2007, because the foster mother’s family had made plans to celebrate her birthday.

However, there were issues with the foster mother trying to arrange a schedule for visits with the father. The foster mother would call him during the week and leave messages but he would wait until the day of the visit to call back. On September 23, 2007, the foster mother stated she wanted the father to call her in advance because she had two sons of her own. As a result, the foster mother had to arrange for a babysitter or accommodate the two boys’ activities around the visits. The father canceled the September 23, 2007 meeting stating he was ill and did not want to make the child sick. The foster mother agreed to set aside Sunday mornings for visits. On September 26, 2007, the father was told that the visits would be scheduled for 9 to 11 a.m. every Sunday at a nearby McDonald’s because a specific time for visits was set aside. The father was bothered by the obligation to set aside a specific time and said the foster mother should know that Sunday was his day. According to the father, the foster mother should make herself available all day and not make other plans. The father missed the September 30, 2007 visit and did not call to cancel or reschedule. On October 7, 2007, he called at 8:22 a.m. and indicated that he was tired and would not attend the visit. The foster mother and the child were already on their way to the visitation location. The child’s great grandmother witnessed a “huge fight between” the father and the mother. During the fight, which occurred in front of the great grandmother’s home, the father struck the

mother. On October 14, 2007, the foster mother called the father at about 8 a.m. and asked if he was coming for the visit. He told her that he would not be able to make it. The father missed the October 21, 2007 visit and did not call or cancel the meeting.

The father was 10 minutes late to the October 28, 2007 visit. The father visited with the child on November 4, 2007, but was 30 minutes late to the visit. The father was 20 minutes late to the visit on November 11, 2007. The child was initially very shy during the visits but eventually responded to the father's efforts to entertain her. The father bought hash browns and milk for the child and two toys for her. The father visited with the child on November 17, 2007, at the mother's residential treatment facility. The child warmed up to the father and the mother. The father indicated that he visited the mother at the facility, which she left on November 19, 2007. The foster mother was out of town from November 20 to 25, 2007. As a result, there was no visit on November 23, 2007. The father missed his scheduled visit on December 2, 2007, because he arrived 50 minutes late. The foster mother waited for 30 minutes before she left but the father did not call or let her know he was running late.

On December 6, 2007, the department reported that the father had only visited the child six times since the last juvenile court hearing on August 9, 2007. The father had not made any arrangements to financially support the child nor had he bought her any clothes. The child had lived with the foster mother since she was six days old. The child basic needs were met in the foster home where she was doing very well.

At the December 6, 2007 section 366.26 hearing, the father's attorney, Deborah Robinson, indicated he would be filing a motion seeking a finding he is a presumed father. Ms. Robinson also desired to develop evidence as to whether the child's best interest would be served by continuing the parent child relationship. The juvenile court continued the section 36.626 hearing to January 17, 2008.

On December 9, 2007, the father called the foster mother at 8:19 a.m. to discuss a December 6, 2007 juvenile court order which granted him three hours of visitation. The father then informed her that he could not make the 9 a.m. visit but subsequently asked if he could come at 6 p.m. The foster mother indicated that she went to church at 4 p.m. so

that the father could visit on Sunday morning. The father said he would call back about a time but never did. The father visited on December 16, 23, and 30, 2007. He also visited on January 6, but missed the January 13, 2008 visit.

On January 17, 2008, the father did not appear for the continued section 366.26 hearing because he had been arrested for obstructing a public officer and failing to stop at a red light. The father was released from custody on January 18, 2008. The foster mother's adoption home study was approved on February 11, 2008.

On February 21, 2008, the father filed a section 388 modification petition seeking the following orders: finding that he is a presumed father; granting him custody of the child and providing for the provision of reunification services; and return of the case to the "Disposition" stage because the department had failed to provide adequate notice or execute due diligence. The father filed a declaration in support of the modification petition in which he stated that he was not at the hospital when the child was born nor was he married to the mother. He was romantically involved with the mother from November until late December 2004. In December 2004, the mother disappeared but he did not know she was pregnant. The father did not hear from her again until November 2006 when he saw her eating lunch at a Burger King restaurant in Long Beach. The mother told him that she had given birth. Further, he was advised by the mother he might be the father of the child. The mother, who was "living on the street," did not provide the father with any contact information. The mother disappeared and the father was could not locate her. The father did not have contact with the mother again until April 1, 2007, when she appeared at his residence and asked for a ride to juvenile court the next day. The father learned of the dependency proceedings at that time. The father accompanied the mother to the April 2, 2007 hearing.

He kept a log of his visits including visits on January 20 and 27 and February 3, 2008. The father stated the foster mother had canceled the January 13, 2008 visit and had consistently prevented him from visiting the child. The father declared that he was disappointed about the child's placement with the foster mother and that he and his

family “are ready, willing and able to care” for the youngster. The father further declared that he had assumed as much parental responsibility as he was allowed.

The department responded to the petition by asserting the father could not raise any notice issues because he did not object to personal jurisdiction at an earlier time. Rather, the father appeared in the proceedings, participated in the hearings, and sought relief from the juvenile court. With respect to the presumed father claim, the department cited to his admission that he never received the child in his home and never held her out as his daughter. Thus, according to the department, he was not a presumed father. The department contended: the father had sexual relations with the mother but did not ascertain whether she was pregnant; the father knew as early as September 2006 but no later than November 2006 that there was a child; the father did not seek to learn the child’s whereabouts, obtain custody, or provide financial or emotional support; the father appeared at the April 2, 2007 hearing to give the mother a ride to court not to assert parental status; the father asked the court for a paternity test and refused to have counsel appointed and did not ask for visitation; the father did not appear in a timely fashion for the initially scheduled blood test; once he knew that he was the biological father, he demanded that the child’s life be upended so that the mother could raise the child; the father’s desire to have the mother assume custody was expressed in the face of evidence of her own patent unsuitability and personal dysfunctionality; and the father visited inconsistently, being late or absenting himself on “flimsy excuses” or with none at all. The department further noted that the father did not pay for the child’s food during the visits, brought toys only once, and never sought to provide for the youngster’s physical needs.

The department contended: the father had not established that reunification was in the child’s best interest; the father had not established he was entitled to reunification services under section 361.5 (which does not apply to non-custodial fathers); there was no basis for reunification services section 361.2 (which states the court need not address the issue of placement or reunification until a non-custodial father seeks custody but in any event applies only at detention); and the child’s best interests were not served by the

father who had “dragged his feet” and only wanted custody to give custody to the “disinterested” mother. In support of this contention, the department attached documents showing that the mother had an extensive history of drug and prostitution arrests and convictions. Those arrests and convictions showed in part that the mother was sentenced to 365 days in jail when the child was about 3 months old. The mother was also committed to prison for 16 months in May 2006.

On March 20, 2008, Referee Valerie Skeba, conducted a hearing on the section 388 petition. She granted the modification petition finding the father was entitled to presumed father status. She ordered reunification services and unmonitored visits. She denied the department’s stay request. The matter was continued to May 1, 2008, for an 18-month review hearing pursuant to section 366.22. A hearing was scheduled for May 1, 2008, to determine the foster mother’s de facto parent petition.

On March 28, 2008, the department filed a rehearing application order pursuant to section 252. (Cal. Const., art. VI, §22; *In re Edgar M.* (1975) 14 Cal.3d 727, 729-741; *In re Randy R.* (1977) 67 Cal.App.3d 41, 43-44.) The department argued the presumed father order should be set aside because: he was found to be a presumed father despite the fact that he did not file the section 388 petition until 10 months after his first appearance in court and 6 months after he received the paternity tests results; the referee made the finding by erroneously applying the legal standard of preponderance of the evidence rather than making the finding by clear and convincing evidence; the father waited until paternity tests results were in to request visitation; the father only had six visits with the child by December 6, 2007; the father canceled or failed to appear at five visits; the father arrived late to visits; the referee improperly set a section 366.22 hearing and incorrectly advanced and vacated the permanent plan hearing when it ordered reunification services for the father; and setting a section 366.22 hearing and vacating the permanent planning hearing improperly shifted the standard of review and burden of proof from the best interests of the child to whether there is a substantial risk of detriment to the youngster. The department further argued that the father’s section 388 petition was

improper as he failed to meet his burden of proving changed circumstances and that it was in the child's best interests to offer reunification services.

The hearing on the rehearing application was set for May 29, 2008. On May 1, 2008, the department notified the juvenile court that the father missed visits on April 13, 20, and 27, 2008. The father did not notify the foster mother that he would miss the April 13, 2008 visit. The father notified the foster mother that he would miss the visits on April 20 and 27, 2008 because he was "trying to get things" situated.

In a report dated May 1, 2008, the department reported a social worker discussed with the father on March 21, 2008, the juvenile court's order regarding reunification services and unmonitored visitation. The father indicated that he would call back with a convenient time. The father did not call back or return telephone messages which were left on his voice mail. On April 2, 2008, the social worker was able to contact the father by telephone. The father refused to provide a current address stating that he wanted to have a stable residence. The father only disclosed that he lived in Long Beach. On April 4, 2008, the father indicated: he wanted the foster mother to continue to monitor the visits until the child was comfortable with him; he did not want the child to be traumatized; and he had a niece attending college in San Diego who he wanted to assist him with future visits. On April 15, 2008, the father was agreed that he would have his unmonitored visits from 2 until 6 p.m. to accommodate the child's nap schedule.

The department further reported that social worker Flor Campos observed a visit with the father and child on February 24, 2008, at a McDonald's restaurant in San Diego. Because it was raining, the child played inside with toys and crayons. The father colored with the child and explained the pictures and rain to the child. The child did not really listen to the father but continued to do her own coloring. At one point, the child asked Ms. Campos to read a book to her. The child asked to sit on the Ms. Campos's lap. Ms. Campos read the book to the child, Ms. Campos then asked the child to sit on the father's lap so he could continue to read the book. The child went to stand next to him while he read. She soon moved to another activity. Ms. Campos did not hear the child refer to him as father or words to that effect.

The father did not appear for his unmonitored visits on March 23 and 30, 2008. On April 6, 2008, the father visited the child at a McDonald's restaurant. The foster mother called the father at 12:20 p.m. because she had not heard from him. He wanted the foster mother to remain with him and the child. The father arrived at the McDonald's restaurant at 3 p.m. and notified the foster mother. The foster mother and child met the father at 3:40 p.m. and the visit ended at 6 p.m. The father had purchased a Happy Meal. The father also had a \$25 Target gift card and rubber duck which the child liked. The father took pictures of the child with his cell phone. The child was very shy and reluctant to talk until she saw the happy meal toy. At the end of the visit, the child became very shy and would not give the father a hug or kiss. When the father tried to grab her, the child yelled at him. The foster mother picked the child. The foster mother told the child to blow the father a kiss.

The department noted that the child had a close bond with the foster family where which she had a loving and nurturing environment. The child, who was friendly and active, had adjusted well to the placement. The child was described as very smart and a quick learner. The department reported "[The foster mother] loves [the] child . . . and considers [the child] her own child." The foster mother was very attentive to the child's needs. The child called the foster mother, "[M]omma." The foster mother did not believe the father should have custody of the child. But the foster mother wanted the father to be a part of the child's life. Additionally, the department's April 23, 2008 report states, "She . . . reported that in the month of November 2006, around the time when [the] child . . . was 15 months old, she ran into [the father] and she informed him they had a child together."

On May 1, 2008, the juvenile court ordered the father to call 48 hours in advance to confirm visits. The father was also ordered to contact the foster mother as soon as possible in the event an emergency required him to cancel a visit. The juvenile court ordered the father to provide an address and telephone number to the department as soon as possible. The foster mother was given de facto parent status. The matter was

continued to July 1, 2008, for a progress report to address status of visits and updated recommendations.

On May 29, 2008, hearing on the department's rehearing application was continued to June 9, 2008. On June 4, 2008, the father filed a response to the rehearing application arguing: he was properly determined to be a presumed father based on the evidence before the referee; he came forward promptly upon learning he was the biological father; he acted properly and sensitively in waiting for paternity tests before demanding visitation rights; the mother thwarted efforts by concealing the child's birth from him for 15 months; changed circumstances were present; and the child's best interests would be served by the referee's orders.

In June 2008, the department reported the foster mother canceled a visit because the foster mother and the child had a pink eye infection. The foster mother canceled the May 11, 2008 visit due to Mother's Day plans. The father visited the child four hours on May 18, 2008 at the McDonald's restaurant. The child did well in the visit but was still not completely comfortable with the father. The child stated she had to go to the restroom. When the father stated that he had to go also, the child shouted "No" to him. The father visited the child four hours on May 25, 2008. Typically during a visit, the foster mother would initiate interaction between the father and the child. However, during the May 25, 2008 visit, the foster mother was not feeling well. Thus, the foster mother did not initiate any interaction between the child and the father. The child held the door so the father could not go outside and play with her. This occurred for a couple of minutes. The child refused the father's requests to open the door. The father visited the child on June 1, 2008. The child was a little warmer with the father. The father mostly visited with the foster mother's son. The father played with the child for 15 minutes.

On June 9, 2008, the juvenile court conducted a rehearing on the section 388 petition. The father was not present at the hearing. The department's rehearing petition was granted. The juvenile court denied the section 388 petition finding the father was neither a presumed father nor entitled to such status based on due process principle. The

juvenile court also vacated the section 366.22 review hearing and ordered the matter returned to the referee to set a hearing pursuant to section 366.26.

The father filed a notice of appeal from the order denying the section 388 petition on June 17, 2008. On June 25, 2008, the father filed notice of intent to file a California Rules of Court, rule 8.452 writ petition seeking review of a June 20, 2008 order setting a permanent plan hearing. On July 25, 2008, the father filed a mandate petition in which he challenged the juvenile court order of June 9, 2008 denying his section 388 petition. We denied the extraordinary relief petition on September 15, 2008. (*E.H. v. Superior Court* (Sept. 15, 2008, B208955) [nonpub. opn.]

II. DISCUSSION

A. Overview

The father argues the juvenile court abused its discretion when it denied his section 388 modification petition. The father argues he was entitled to be treated to be treated as a presumed father pursuant to *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 849. Further, he asserts it was in the child's best interests for the requested change of order to be entered in that there was no evidence he was unfit. The father also contends there was noncompliance with the Indian Child Welfare Act.

B. The Section 388 Petition

The father argues the juvenile court's finding he is not entitled to presumed father status pursuant to *Adoption of Kelsey S.*, *supra*, 1 Cal.4th at page 846 is not supported by sufficient evidence. Family Code section 7600 et seq. governs paternity determinations. (*Dawn D. v. Superior Court* (1998) 17 Cal.4th 932, 937; *In re J.L.* (2008) 159 Cal.App.4th 1010, 1018.) California law recognizes alleged, biological, and presumed fathers. (*Ibid.*; *Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 595.) Our

Supreme Court has explained: “A biological or natural father is one whose biological paternity has been established, but who has not achieved presumed father status . . . [Citations.] A man who may be the father of a child, but whose biological paternity has not been established, or, in the alternative, has not achieved presumed father status, is an ‘alleged’ father. (See *In re Shereece B.* (1991) 231 Cal.App.3d 613, 620-621.)” (*In re Zacharia D.* (1993) 6 Cal.4th 435, 449, fn. 15.) Presumed fathers are accorded far greater parental rights than alleged or biological fathers. (*Id.* at pp. 448-449; *In re J.L.*, *supra*, 159 Cal.App.4th at p. 1018.) The Court of Appeal has stated: “Presumed father status is governed by [Family Code] section 7611, which sets out several rebuttable presumptions under which a man may qualify for this status, generally by marrying or attempting to marry the mother or by publicly acknowledging paternity and receiving the child into his home. (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 802-803, [Fam. Code] § 7611, subds. (b)-(d).)” (*In re J.L.*, *supra*, 159 Cal.App.4th at p. 1018.) Biological fatherhood does not, in and of itself, qualify a man for presumed father status under Family Code section 7611. Rather, presumed father status is based on the familial relationship between the man and child, rather than any biological connection. (*In re J.L.*, *supra*, 159 Cal.App.4th at p. 1018; *In re T.R.* (2005) 132 Cal.App.4th 1202, 1209-1210.) An unmarried biological father may, under narrow circumstances, assert constitutional paternity rights, even though he does not qualify under any of the presumptions listed in Family Code section 7611. (*Adoption of Kelsey S.*, *supra*, 1 Cal.4th at p. 849; *Gabriel P. v. Suedi D.* (2006) 141 Cal.App.4th 850, 860.)

The juvenile court did not err in ruling the father was neither a presumed father nor entitled to be treated as such pursuant to *Kelsey S.* We review presumed father determinations for substantial evidence. (*Adoption of Arthur M.* (2007) 149 Cal.App.4th 704, 717; *In re A.A.* (2003) 114 Cal.App.4th 771, 782.) First, there is substantial evidence he does not qualify as a presumed father. (Fam. Code § 7611, subd. (d); *In re J.L.*, *supra*, 159 Cal.App.4th at p. 1023.) The father has never received the child in his home nor did he immediately hold the child out as his own. Although the father was not immediately aware of the child’s birth, he did become aware of her existence no later

than November 2006. However, when the father heard about the child's existence no later than November 2006, he did nothing until April 2007 when he demanded a paternity test. Thus, the father is not a presumed father because he never received the child in his home nor did he immediately hold her out as his own. (See *In re Zacharia D.*, *supra*, 6 Cal.4th at p. 449; *In re Vincent M.* (2008) 161 Cal.App.4th 943, 954; *In re Phoenix B.* (1990) 218 Cal.App.3d 787, 790, fn. 3.)

Second, there is no merit to the father's assertion he was entitled, as a matter of law, to be treated as a presumed father pursuant to the *Kelsey S.* analysis. The juvenile court terminated the mother's reunification services on June 7, 2007, and scheduled a section 366.26 hearing for December 6, 2007. The section 388 petition requesting reunification services, presumed father status, and custody of the child was filed on February 21, 2008. This was seven months after reunification services were terminated. Given the belated stage of the dependency process in which the presumed father issue was raised, we consider in the context of a section 388 determination. (*In re Zacharia D.*, *supra*, 6 Cal.4th at pp. 453-456; *In re Vincent M.*, *supra*, 161 Cal.App.4th at pp. 948-958.)

Section 388 provides in part: "(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court or the child himself or herself through a properly appointed guardian may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court or in which a guardianship was ordered pursuant to Section 360 for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. The petition shall be verified and, if made by a person other than the child, shall state the petitioner's relationship to or interest in the child and shall set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order or termination of jurisdiction. . . . [¶] (d) If it appears that the best interests of the child may be promoted by the proposed change of order, . . . termination of jurisdiction, . . . the court shall order that a hearing be held and shall give prior notice, or cause prior notice to be given, to the

persons and by the means prescribed by Section 386, and, in those instances in which the means of giving notice is not prescribed by those sections, then by means the court prescribes.” We review an order denying a section 388 petition for an abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re S.J.* (2008) 167 Cal.App. 4th 953, 959-960.)

The juvenile court did not abuse its discretion in finding it was in the child’s best interests to deny the section 388 petition. The father learned about the child’s existence no later than November 2006 but he did not do anything other than try to locate the mother. Specifically, there is no evidence the father did anything to locate the child. Even though the father knew the maternal relatives and was apparently on good terms with them, he did not attempt to do anything to ascertain the whereabouts of the child or to assume responsibility for her. In November 2006, the child was about 15 or 16 months old. The father did not make his presence known until five months later in April 2007. The father merely appeared at a hearing with the mother whose reunification services were about to be terminated. The child, who was then about 20 months old, had been living with a foster mother. The child had been in the only home she knew since she was less than two weeks old. The father has never received the child into his home and did not immediately hold her out as his own. Rather, at the April 2007 hearing, the father asked for a paternity test and then refused appointment of counsel. Once paternity was established, the father exercised sporadic and inconsistent visitation rights. The father has even consistently refused to provide an address so that his home could be evaluated. The child, who was described as friendly and outgoing by all accounts, was shy, temperamental, and almost rude to the father during the visits. Since the father had known of the child’s existence in November 2006, the father had only purchased and given the child: one Happy Meal, hash browns, and milk at a McDonald’s restaurant; a \$25 Target gift card; a rubber duck; and a silver necklace which would normally be worn by an adult. The father had never spent any time with the child alone. Even after he obtained unmonitored visits, the father still wanted the foster mother to be present.

By contrast, the child was openly affectionate to the foster mother. The child was very bonded to the foster mother. Also, the child's daily needs were met by the foster mother. The child was thriving, happy, and well cared for in her foster home. Special occasions such as her birthdays and holidays had been shared with the foster family since the child's birth. An order changing custody would have disrupted the stable life that the child had had for almost three years. Without abusing discretion, the juvenile court would conclude no showing of the child's best interest was established from placing her with a person she barely knew except through court-ordered and inconsistent visits. (*In re Vincent M.*, *supra*, 161 Cal.App.4th at p. 954; see *In re Zacharia D.*, *supra*, 6 Cal.4th at p. 449.)

C. Compliance with the Indian Child Welfare Act

The father asserts the order must be reversed as there was noncompliance with the Indian Child Welfare Act. The father argues the department failed to include sufficient information about the maternal relatives in the notices and no notice was given about the father. The Indian Child Welfare Act states in part, "[W]here the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912(a); see *In re Shane G.* (2008) 166 Cal.App.4th 1532, 1538.) When the tribe cannot be determined, the notice must be given to the Indian affairs bureau. (*In re Miguel E.* (2004) 120 Cal.App.4th 521, 549; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 258.) The department concedes that there were irregularities in complying with the notice requirements as to the father. We agree with the department's argument that the matter must be remanded for the limited purpose of determining compliance with the notice requirements. (See *In re Brooke C.* (2005) 127 Cal.App.4th 377, 385; *In re Miguel E.*, *supra*, 120 Cal.App.4th at pp. 549-550; *In re Karla C.* (2003) 113 Cal.App.4th 166,

174-176.) If no tribe responds that the child is an Indian, the juvenile court shall reinstate its order denying the section 388 petition. If a tribe indicates the child is a tribal member, then the juvenile court is to proceed in compliance with the Indian Child Welfare Act.

IV. DISPOSITION

The order denying the section 388 petition is conditionally reversed and the cause is remanded solely to ensure compliance with the Indian Child Welfare Act as discussed in the body of this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

MOSK, J.

KRIEGLER, J.